92-552

No. [redacted]

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JOE ALLEN BAKER, M.D.,

Petitioner,

vs.

GULF + WESTERN INDUSTRIES, INC., GULF + WESTERN FOOD PRODUCTS, CO., RISK MANAGEMENT SERVICES, INC. and FRANK B. HALL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS GULF + WESTERN INDUSTRIES, INC. AND GULF + WESTERN FOOD PRODUCTS, CO.

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QUESTIONS PRESENTED

I. Whether certiorari should be denied because Petitioner failed to adequately raise the claim that because Title VII relief is unavailable, *Patterson v. McLean Credit Union* should not bar this termination claim.

II. Whether certiorari should be denied because Petitioner failed to previously raise the issue of retroactive application of the Civil Rights Act of 1991.

III. Whether certiorari should be denied because Petitioner's claim that Title VII would not apply to this case and *Patterson* should not bar his claim is without merit.

IV. Whether certiorari should be denied because alternative grounds predominate and support affirmance.

PARTIES TO THE PROCEEDING

The parties to the proceeding before this Court are:

Petitioners:

JOE ALLEN BAKER, M.D.

Respondents:

GULF + WESTERN INDUSTRIES, INC.,

GULF + WESTERN FOOD PRODUCTS CO.,

RISK MANAGEMENT SERVICES, INC.,

FRANK B. HALL, INC.

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STATEMENT OF FACTS AND PERCEIVED MISSTATEMENTS OF FACT BY PETITIONER

A. Statement of Facts

Respondent Gulf + Western Industries, Inc. (Gulf + Western) was a grower of sugarcane in South Florida. Respondent Risk Management ("Risk") was an adjuster ("claims administrator") and managed Gulf + Western's workers' compensation program required by state law. Petitioner Joe Allen Baker (who is 69 years old) is white and was a physician in rural Belle Glade, Florida who specialized in treating injured workers of Gulf + Western and other growers. He was called the "Medical Director" of Respondent Gulf + Western for some 15 years ending in 1980 (R6-253) and of other companies.

Gulf + Western and other companies annually employed a large number of imported West Indian harvest workers to cut cane under written contracts with the home governments (often Jamaica) through their agent, the British West Indies Central Labour Organisation ("BWICLO") (R7-243(I), R6-253 ¶ IV-D; R3-77 pp. 59-61). These workers arrived under a special U.S. Department of Labor program limiting the work they could do while in the United States.

For many years it was customary because of the high volume of claims in a short season to bill for treatment of BWICLO workers by a flat-fee per claim, originally arrived at by averaging the overall cost per claim, but later renegotiated every year or two (R6-231 p. 111; R12-294 p. 203; R7-241 ¶ 6; Petitioner's brief below, pp. 4-5). Petitioner claims that in later years the BWICLO rate worked out to be lower than the statutory maximum itemized or "unbundled" rates he was permitted to charge for domestic black and white workers (R12-294 p. 203, R3-77 pp. 55-6). He claims to suspect a racial motivation (Baker Affidavit p. 24). Petitioner testified (and conceded by not controverting the issue in

any Responsive Statement to Defendant's Statement of Material Facts not in dispute as required by Local Rule 10(j)(2) of the District Court) that he rendered the same high quality of care to the BWICLO workers that he did to all others including the bank president, unaffected by the rate schedule, that he was expected to do so and wouldn't do otherwise (R7-246 p. 4, R3-77 pp. 39, 53, 60-1, 63, 66-7; R6-234 p. 120; R7-246 p. 4).

Petitioner came under suspicion of conflict of interest, bill-padding or similar misconduct in early 1980 after examination of his charges by Risk, disclosure of an undocumented "loan" (without any repayment or note) to the adjuster approving his bills and because of his close friendship with an employee of Gulf + Western overseeing his charges, who was also Petitioner's attorney (R8-254 p. 9 and Exh. 10; R6-234 pp. 14, 32, 80-83, 88). It was disclosed some six years later by Petitioner in deposition that he had made a similar "loan" to that Gulf + Western employee in addition to being represented by him as his attorney not only in unrelated matters, but *in actual negotiations with Gulf + Western.*

Petitioner was terminated sometime prior to the fall harvest season in 1980 (R3-77 p. 88). He claims his termination was in retaliation for or as a result of his refusal to bill on a flat-rate basis and that the termination was "racially motivated."

Risk was fired, it fired the adjuster, the Gulf + Western employee lost control of the sugarcane operation worker's compensation program and a new Hispanic physician hired to treat all workers under a written contract providing uniform modified "flat-rate" fees for all workers, alien and domestic (R8-239 pp. 6-7 and Exh. A). This physician is the same one Petitioner testified that he would have selected as his successor (R12-294 p. 155).

Over a year after his termination, Petitioner received and deposited a check for all balances remaining in question with

release language in the accompanying letter as well as the check. Respondent Gulf + Western sold its sugarcane operations several years later, in 1984.

B. Perceived Misstatements of Fact

Petitioner consistently recites disputed issues as factual, perhaps carrying forward a pattern tolerated in direct appeal from summary judgment because of assumptions favorable to the nonmoving party where record proof is conflicting. Petitioner relies heavily upon claims made and conclusions supported only by his own affidavit (which was protested below as not in compliance with Rule 58 and as containing hearsay, inadmissible conclusions and unsupported opinions and not affirmatively demonstrating admissibility). Disputed allegations include Petitioner's "belief" that there was any discriminatory intent; that rates paid him were lower; that Petitioner never complained about flat-fee arrangements; that refusal to bill on a "flat-fee" arrangement was the cause of his rates being higher than those of other doctors (there is no indication that any others *were* billing on a flat-fee basis); that BWICLO workers were usually more seriously injured than other workers (the same "flat-fee" was paid for minor abrasions and debris in eyes or ears as well as for cuts); that Gulf + Western ever agreed to his unilateral rate changes; that Petitioner refused to enter into a new contract and that his firing was related to any flat-rate agreement as opposed to suspected overbillings, kickbacks or conflicts of interest, excessive fees and simple economic competition. Since it is the province of the courts below to determine the existence of disputed material issues rather than the traditional role of this Court on certiorari, Petitioner's practice of stating his own claims as factual is inappropriate.

HISTORY OF THE CASE

In April, 1984, (nearly four years after the disputed events) Petitioner sued for compensatory and punitive damages under 42 U.S.C. § 1981 claiming that his termination as "Medical Director" directly resulted from his alleged refusal to charge lower rates for alien workers than for domestic workers. He claimed his contract had been orally renewed for the 1980-81 crop year and then wrongfully terminated. He also made similar § 1981 claims for previous crop years, and asserted pendent state claims on the same facts for "intentional infliction of emotional distress" and for breach of contract (R1-1; R1-9). Two years later the trial court dismissed the action as untimely, applying a two-year limitation period. The Court of Appeals for the Eleventh Circuit, applying this Court's intervening decision in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S. Ct. 2617 (1986) reversed, applying the 4-year Florida tort limitations period. Dismissal of the pre-1979 claims was affirmed. After remand the case proceeded through all pretrial phases including pretrial conferences, stipulation and order after extremely voluminous document production and over 40 depositions in various states.

This Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989) in June, 1989 following extended press coverage and speculation regarding the viability of private civil actions under § 1981. In April 1990, Respondents moved for summary judgment relying alternatively on *Patterson*, and on Petitioner's total failure to present a *prima facia* claim and to refute Respondent Gulf + Western's legitimate nondiscriminatory articulated reasons for his termination (suspicion of overbilling, conflict of interest, appearance of bribery and noncompetitive rates resulting in termination not only of Petitioner, but of Risk and its adjuster and complete restructuring of the safety (workers' compensation) department.

Pretrial proceedings were concluded and pretrial stipulations filed acknowledging the application of *Patterson* to be an issue for determination by the court (R7-253). On September 25, 1990, six months after pretrial and 10 years after the disputed events at summary judgment hearing, Petitioner for the first time presented proposed amendments. His amended complaint alleged, contrary to his repeated emphatic testimony that the contract originally claimed to have been renewed and then terminated was instead never renewed at all. Petitioner also attempted to add for the first time a claim under 42 U.S.C. § 1985 on identical facts claiming a private conspiracy.

The trial court granted summary judgment (R13-327 p. 330), denied Petitioner's belated post-pretrial amendments as untimely and entered final judgment for respondents. The trial court concluded that under *Patterson,* Petitioner's termination claim was meritless and that state law grounds, including release and good cause for termination, supported disposition of the remaining claims. The court noted that Petitioner had "simply not met its *Celotex* burden as to any of the claims." [referring to *Celotex v. Catrett,* 477 U.S. 317 (1986)].

Petitioner appealed, asserting as error the claim that *Patterson* does not apply to a refusal to renew a contract, as well as the denial of his proposed amendment and the dismissal of the contract claim. Petitioner *did not* appeal dismissal of its "intentional infliction of emotional distress" claim on state law grounds.

On appeal, Respondents argued alternatively that nonrenewal of Petitioner's longstanding relationship was "postcontractual" under *Patterson* and that Petitioner had failed to demonstrate a *prima facie* claim or to refute Respondents' legitimate, nondiscriminatory basis for Petitioner's firing [*Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089 (1981); *McDonnell-Douglas v. Green,* 411 U.S. 742, 93 S. Ct. 1817

(1973)]. Respondents argued that the trial court's discretionary denial of Petitioner's belated post-pretrial amendment was proper due to Petitioner's 10-year delay and also due to the futility of amendment since under *Patterson*, nonrenewal is as much a postcontractual event as discharge. Finally, Respondents argued the futility of amendment to add a § 1985 claim since the same was no more supported by the record than was the § 1981 claim and was further unavailable to Petitioner since a remedy had been available under Title VII.

The Civil Rights Act of 1991 was enacted in November, 1991. Thereafter Respondents filed their answer briefs and Petitioner its reply brief. Oral argument was held on April 1, 1992 with *per curiam* affirmance on April 17, 1992. Petitioner's Motion for Rehearing and for Rehearing *en banc* was filed on May 6, 1992 and denied June 26, 1992.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO ADEQUATELY RAISE THE CLAIM THAT BECAUSE TITLE VII RELIEF IS UNAVAILABLE, *PATTERSON V. MCLEAN CREDIT UNION* SHOULD NOT BAR THIS TERMINATION CLAIM.

Petitioner's position as company doctor was probably an independent contractor relationship, rather than a common-law "employee" status as observed by the Eleventh Circuit. *Baker v. Gulf + Western Industries, Inc.*, 850 F.2d 1480 (11th Cir. 1986). Petitioner is white. He does not claim discrimination against himself based on his race, nor does he attempt to redress injury to others. His demand for millions in windfall punitive damages for himself is predicated upon the apparent claim that termination of

his status as "medical director" was in retaliation for his claimed refusal to charge different rates for treating alien harvest workers than for treating domestic black and white employees. He claims racial motivation although he rendered identical treatment and the rate structure was without impact. (The flaws in that logic are addressed elsewhere in this brief.)

Petitioner has never articulated any authority for his supposed § 1981 claim, leaping directly from the assertion of Respondents' claimed racial animosity toward others to the conclusion that his firing was in violation of § 1981. Respondents and the courts below have assumed (in the absence of any authority articulated by Petitioner) that Petitioner relies upon cases following *DeMatteis v. Eastman Kodak*, 511 F.2d 306 (2nd Cir 1975), *modified on other grounds*, 520 F.2d 409 (2nd Cir. 1975) (where, for example, an employee was fired for selling his home to a black family). His claim already rests upon an extension of § 1981 beyond any scope directly sanctioned by this Court although retaliation cases under § 1981 have been upheld by various Circuits [*see, e.g., Parr v. Woodmen of the World*, 791 F.2d 888 (11th Cir. 1986); *Skinner v. Total Petroleum*, 859 F.2d 1439 (10th Cir. 1988); *The Dartmouth Review v. Dartmouth College*, 859 F.2d 13 (1st Cir. 1989); *Albert v. Caravano*, 851 F.2d 561 (2nd Cir. 1988)].

Respondents have consistently asserted that Petitioner's attempts to clothe himself in *DeMatteis* fall short, and even the viability of *DeMatteis* is subject to question after *Patterson* (there the firing would be postcontractual). Petitioner now asserts that *Patterson* only applies to common-law employment claims and cannot bar his claim because as an independent contractor he had no Title VII remedy. He appears to be wrong, as argued elsewhere. The focus of *this* argument is that Petitioner has never before adequately presented this position.

A review of Petitioner's briefs on appeal discloses two

references to Title VII, neither of which is sufficient to support an argument that the issue was adequately presented to the Circuit Court.

Arguing that the nonrenewal of Petitioner's contract was not termination but a "refusal to contract" or a refusal to offer nondiscriminatory terms under *Patterson,* Petitioner states, "it should also be noted that neither of these theories would fall within the scope of Title VII" (at p.17 of Petitioner's main brief).

In Respondents' answer brief Gulf + Western argued that Petitioner's attempted § 1985 claim was not only untimely but futile, since § 1985 creates no new rights and in addition cannot be asserted where a Title VII remedy is available [*American Federal Savings & Loan Association v. Novotny,* 442 U.S. 366, 99 S. Ct. 2345 (1979)]. In reply, Petitioner argued (at p. 8 n. 3) that "Gulf + Western claims the Plaintiff might be considered an employee for Title VII purposes, but cites only cases where physicians' hospital privileges were at issue. Dr. Baker was not an employee of Gulf + Western under any analysis and, therefore, could have no Title VII claim against the Defendants."

Before even asserting a refusal to contract, Petitioner had to establish an abuse of discretion in the trial court's refusal, 10 years after the fact, 6 months after pretrial and 1 1/2 years after *Patterson* to permit his amendment to add a claim of nonrenewal to its claim of termination. It is much different, in one sentence, to assert unavailability of Title VII relief as a circumstance for consideration in that context or in the addition of a § 1985 claim than to devote nine (9) pages as it does here to arguing that *Patterson* applies only to common-law employment claims.

Petitioner's briefs below totalled fifty pages. Petitioner can hardly be said, in two sentences equally referable to equitable circumstances supporting amendment and to its § 1985 claim, to

have properly framed the argument that *Patterson* by its terms applies only to common-law employment relationships to which it devotes nine pages here.

This Court has in the past applied a stringent standard in determining whether issues were adequately framed and presented on appeal below. In *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645 (1988) the court rejected similarly vague and "oblique" references as inadequate. "Perfunctory" and "skeletal" arguments have been held not to preserve an issue for review by lower courts *Luddington v. Indiana Bell Telephone Co.*, 960 F.2d 225 (7th Cir. 1992). Either the issue is a passing one meriting only two "oblique" and vague references or it is an urgent matter of great public importance so as to support certiorari in which event the Circuit Court should have been given a clear opportunity to address it.

II.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER FAILED TO PREVIOUSLY RAISE THE ISSUE OF RETROACTIVE APPLICATION OF THE CIVIL RIGHTS ACT OF 1991.

This Court has previously refused to review the merits of several cases wherein plaintiffs failed to present to the court below their arguments for retroactive application of the Civil Rights Act of 1991 [*Hicks v. Brown Group, Inc.*, 91-1116, 112 S. Ct. 1255, 1992 U.S. Lexis 1380 (March 2, 1992); *Holland v. First Virginia Bank, Inc.*, 91-974, 112 S. Ct. 1152, 1992 U.S. Lexis 1266 (February 12, 1992); *Gersman v. Group Health Associates, Inc.*, 91-724, 112 S. Ct. 960, 1992 U.S. Lexis 655 (January 27, 1992)]. In each of those cases, appeal below was concluded and petition to this Court apparently filed before enactment of the 1991 Act which has been reported as November 7, 1991 with an effective date of

November 21, 1991. Each was remanded for consideration of the issue.

The Court has refused without remand to review a previous case wherein, although the appeal below was concluded after enactment of the 1991 Act, its asserted retroactivity was not raised below *Hamilton v. Komatsu-Dresser, Inc.*, 92-275, 113 S.Ct. 324, 1992 U.S. Lexis 6422 (October 13, 1992). There the case was argued below a month after enactment and the appeal decided 5 months later in May, 1992 with no attempt to raise the issue in the interim period nor by rehearing motion.

Here the case remained before the Circuit Court for 7 1/2 months after enactment and Petitioner remained silent on the issue in its reply brief, at oral argument, in its rehearing motion and never sought supplementation under Federal Rule of Appellate Procedure 28(j), despite spectacular coverage in the national and professional media.

III.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S CLAIM THAT TITLE VII WOULD NOT APPLY TO THIS CASE AND *PATTERSON* SHOULD NOT BAR HIS CLAIM IS WITHOUT MERIT.

Petitioner now argues that *Patterson* applies only where Title VII remedies are available to a plaintiff. Despite this Court's carefully articulated opinions setting forth the logical and semantic foundations of its decision, Petitioner attempts by directing his attention to a few selected sentences to transform *Patterson* into a mere policy decision by this Court to direct aggrieved plaintiffs toward Title VII remedies by depriving them of relief under § 1981. Without yielding further to the temptation to brief the merits here, it is sufficient to say that Petitioner cites not a single

decision, appellate or otherwise, in support of its interpretation. If the issue is of great importance it will in short order be asserted in a case which truly presents it and in which the court below has passed upon it.

Further demonstrating the inappropriateness of this case as a vehicle for determining matters of great public importance (if indeed this is such an issue) Title VII relief probably was available to Plaintiff had it been sought. Contrary to Petitioner 's assertion, a common-law employment relationship is not always required for Title VII relief. In fact, physicians have been singled out for relief despite independent contractor status. In *Pardazi v. Cullman Medical Center,* 838 F.2d 1155 (11th Cir. 1988) Title VII relief was predicated on denial of staff privileges interfering with a contract of employment by others. (*Id.* at 1156; *see also, Lutcher v. Musician's Union Local 47,* 633 F.2d 1019 (9th Cir. 1980); *Gomez v. Alexian Bros. Hospital of San Jose,* 698 F.2d 1019 (9th Cir. 1983). Even the interference with a physician's contract with his or her own patients has been held sufficient to support such relief, *Doe v. St. Joseph's Hospital of Fort Wayne,* 788 F.2d 411 (7th Cir. 1986); *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 at 1342; *Pao v. Holy Redeemer Hospital,* 547 F. Supp. 484, 494-5. Analogously, a part-time public defender was afforded Title VII relief in *Ellerby v. Illinois Circuit Court,* 1988 U.S. Dist. Lexis 2092, 46 Fair Empl. Prac. Cas. (BNA) 524 (N.D.Ill. 1988) wherein the court observed:

> the ultimate question posed . . . is not whether the Plaintiff is an employee or independent contractor; rather, the query is whether the Plaintiff may bring an action under Title VII.

Petitioner misses the point in attempting to distinguish these cases as involving "staff privileges." The point is that a racially-motivated interference by a third party with whom the Petitioner

has only an independent contractor relationship (here the Respondent, there the hospitals) interferes with the employment relationship between patient and physician. If Petitioner's claim here had merit at all it would be because Respondent's termination of Petitioner would have interfered with just such relationships.

This Title VII issue is itself a difficult and significant issue, and however decided would not afford Petitioner relief under Title VII which he waived eleven years ago. Its determination would, however be a prerequisite to the re-examination or modification of *Patterson* which Petitioner demands by asserting the unavailability of Title VII relief.

Petitioner is incorrect in attempting to distinguish *Patterson*. Moreover, this issue serves to demonstrate the inappropriateness of this case as a vehicle for any re-examination of *Patterson*.

IV.

CERTIORARI SHOULD BE DENIED BECAUSE ALTERNATIVE GROUNDS PREDOMINATE AND SUPPORT AFFIRMANCE.

Petitioner testified repeatedly that despite any fee arrangement he gave all workers the same high quality care. He would not have done otherwise and wasn't expected to. He also conceded this fact under local Rule 10(j)(2) when he elected not to file a responsive Statement of Facts in issue. Therefore, the racial motivation Petitioner might purport to impute from the presumed logical extension of his argument – that a differing fee arrangement would result in poorer medical care – is refuted both as to reality and as to the parties' expectations by his own testimony. It neither occurred nor was it expected to.

Petitioner in fact professes no knowledge of why he was

terminated but allows as possibilities personal vendetta and economic and other factors (R12-294, pp. 141, 143, 145-6, 156-7; R12-294 pp. 158, 205). All are permissible, if not laudable nondiscriminatory reasons. *Brown v. American Honda Motor Company Inc.*, 936 F.2d 946 (11th Cir. 1991); *NIX v. WLCY Radio/ Raball Communications,* 738 F.2d 1181, 1187 (11th Cir. 1984).

He concedes that, when the flat-rate agreement was in effect the rate determination was not based on race nor even alienage, but on whether an employee was a BWICLO seasonal contract employee or not. For example, a Jamaican he treated under contract would generate one fee, but the same Jamaican if not under contract would be billed as if a domestic black or white worker (R3-77 pp. 60-63, 108). He had no intention of discriminating against offshore workers, nor at the time did he believe the growers did (R12-294 p. 202).

When Petitioner claims to have been terminated for refusing to return to a flat-fee arrangement, Petitioner admits that there was neither a discussion of *what* that rate would be nor to whom it would apply – high or low, uniform or differential rates (R3-77 pp. 81-2; R12-294 p. 203). His successor's contract clearly provided identical rates for all workers (R8-239 pp. 6-7 and Exhibit A). The Petitioner would not have accepted the job for the rates the successor agreed to (R10-286 pp. 17-19) and the successor is the man Petitioner would probably have selected himself (R12-294 p. 155).

Petitioner was under suspicion of overbilling and conflict of interest (R8-254 p. 9 and Exh. 10; R8-240 p. 5; R8-239 pp. 4 -8), he had made undocumented, unrepaid loans of $4,000 and $4,500 to both the outside adjuster and the Gulf + Western employee overseeing his work and charges (R6-234 pp. 79-81, R10-286 p. 67; R10-286 p. 67, R3-77 pp. 100-103). The Gulf + Western employee actually overseeing Petitioner's fees represented

Petitioner as his attorney in negotiations with his employer (R6-234 pp. 14, 32, 80-83, 88).

Not only was Petitioner terminated, but the adjusting company (Corespondent Risk Management), and its adjuster were fired and the Gulf + Western employee lost responsibility for the entire program [R8-254 p. 10 and Exh. 12; R7-240 ¶ 4(a); R7-239 ¶ 5; R7-239 ¶ 5; R7-240 ¶ 4(b)].

In short, there was no classification by race and (to the extent pertinent under § 1981) no disparate impact. There is no direct evidence of racially-motivated intent nor can any be inferred. Petitioner's termination is supported by economic competition, and by grounds found as a matter of law by the trial court, and affirmed on appeal, to have constituted good cause for termination. The successor chosen and the terms of his contract dispel any implication of racial motivation.

Petitioner failed to present any analysis of his claim under *Burdine* and *McDonnell-Douglas, supra,* and never even responded to Respondent's analysis. Petitioner failed by any direct evidence or otherwise to refute Respondent's legitimate, nondiscriminatory cause. Petitioner simply leaps from a claim of differential billing rates to a conclusion of intentional racial discrimination.

Respondent preserved all of these issues on appeal, asserting its right to: ". . . defend its judgment below on any ground properly raised below whether that ground was relied upon, rejected or even considered . . ." *Washington v. Yakima Indian Nation,* 439 U.S. 463, 476, 99 S.Ct. 740, 749 n. 20 (1979); *Marshmcbirney Inc. v. Montedoro-Whitney Corp.,* 882 F.2d 498 (D.C. Cir. 1989). This respondent devoted approximately 1/2 of its briefs below to these issues and the bulk of its argument in the trial court.

Judging by the seventeen-day period between argument and *per curiam* affirmance, the Circuit Court had little difficulty affirming the summary judgment on this record. If the reasoning of a court can ever be deduced from a panel's questions (and perhaps it cannot) the primary issues of inquiry were (a) why Petitioner felt it had raised any *prima facie* claim and (b) why it felt entitled to argue unpleaded pre-contractual discrimination without first overcoming the "abuse of discretion" standard of review and thereby being permitted its belated reversal of position in its alternative claim.

Petitioner asserts that this cause presents for determination two issues of great public importance, but neither has been previously presented. Moreover, in both courts below Petitioner has failed to persuade eminent jurists that even a material issue or a *prima facie* case were presented. The *per curiam* affirmance below is equally consistent with the application of *Patterson* of which Petitioner now complains and with a finding that Petitioner has utterly failed under any analysis, pre- or post *Patterson* to present the essential elements of a claim.

Respondents have been required to explore the entire record and a multitude of issues for nearly nine years and in two courts. Neither Respondents nor this Court should be burdened with a third exploration.

CONCLUSION

For the reasons set forth above it is respectfully concluded that certiorari should be denied.

Respectfully submitted,

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